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In the Supreme Court of the United States

October Term, 1981

MILDRED L. JOSEPH, COLEEN FINKS, LLOY GLOVER, HOPE SMALL, and PHYLLIS FERGUSON,
Petitioners,

vs.

CHRISTOPHER S. BOND, Governor, State of Missouri, and, RAY S. JAMES, Director, Missouri Department of Revenue,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

The Brief Of Respondents In Opposition To The Petition For Certiorari Misdirects The Focus Of This Controversy From First Amendment Rights To The Traditional Political Underpinnings Of The Fee Agent System

It is evident from reading the Brief of Respondents that they have failed to grasp the dominant principle underlying this Court's decisions in *Elrod v. Burns*, 427

U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). In *Elrod*, this Court made clear that "[t]he cost of the practice of patronage is the restraint it places on freedoms of belief and association." 427 U.S. at 354. Respondents argue that this Court should decline review of this case because Missouri's system of terminating fee agents on the basis of their political affiliation presents none of the "traditional disadvantages" of patronage (Brief of Respondents at 17-18, 23). Not surprisingly, respondents make no attempt to explain how the uniqueness of this system alleviates the coercive effect it has on petitioners' freedom of speech and association—the paramount deficiency recognized by this Court.

The six justifications cited by respondents for retention of the fee system on a political basis focus entirely on the effect of the system on the state. Adherence to this position would allow a state to circumvent constitutional considerations by cloaking positions with near autonomy. Under this Court's earlier patronage decisions, the focus should properly be on the First Amendment issues and the state interests advanced as justifications for continued viability of a patronage practice, not on the lack of disadvantages of that system to the state. This analysis must be applied whether or not the holdings of *Elrod* and *Branti* can be expanded to encompass this patronage practice. As will be seen in Point III of Petitioners' Brief, the fee system is prevalent throughout this country and represents a distinct and substantial type of governmental largess. Thus, the position of the respondents that the state can, with calculation, conceive an appointed position which has no function other than to serve as a "method by which local political lieutenants are both rewarded for their services and compensated during the term of the administration which they helped elect . . . ." (Brief

in Opposition, pp. 20-21) is constitutionally flawed under the line of cases dealing with government entitlements as well as the first amendment. The state cannot dole out a gratuity and thereafter revoke it on constitutionally infirm reasons despite the fact that the gratuity may have been originally conceived or appropriately suitable as a political gratuity. The First Amendment demands that this issue be resolved in the traditional First Amendment manner. Whether or not *Elrod* and *Branti* specifically apply to this situation, this Court must balance the First Amendment rights of fee agents against state justifications using a compelling interest standard.

To further defeat First Amendment analysis by this Court, respondents ask this Court to decline review of the fee system for the reason that it would represent "a further incursion by the judicial system into the traditional authority of the states to regulate their business affairs." (Brief of Respondents at 15). Respondents fail to recognize that this Court undertakes such an incursion because it is the final arbiter of the constitutional rights of the citizens of this country. The states enjoy no "traditional authority" to regulate their business affairs in a manner which impinges upon constitutionally protected rights; the Fourteenth Amendment to the United States Constitution is an overriding limitation against any state action which burdens those rights and cannot be avoided under the guise of regulation of business affairs. Again, respondents attempt to misdirect the Court's attention from the First Amendment issue which is the real center of this dispute.

II.

Petitioners Properly Preserved Their Equal Protection Analysis For Review In This Court By Raising It In Both The District Court And The Court Of Appeals

Respondents submit that this Court is foreclosed from reviewing this controversy on equal protection grounds because the Complaint as originally filed in the district court did not allege any equal protection violation. Review on such grounds is not foreclosed because the issue was briefed in the district court and briefed and argued in the appellate court without objection by the respondents.

Although an equal protection analysis is not frequently undertaken to resolve a core First Amendment issue, petitioners believe such an analysis is warranted here because of Missouri's utilization of both fee agents and state employees to perform virtually identical functions relative to vehicle registration and driver licensing. In *Gibbons v. Bond*, 523 F.Supp. 843 (W.D.Mo. 1981), *aff'd* 668 F.2d 967 (8th Cir. 1982) the district court for the Western District of Missouri found that political affiliation is not an appropriate requirement for the effective performance of the position of motor vehicle branch manager, a counterpart to the position of fee agent. The only major difference between these two positions is that of control and compensation; branch managers are state employees compensated by the state, while fee agents maintain a greater degree of autonomy and are compensated by fees received directly from the public. This line of demarcation imposes an arbitrary classification which burdens First Amendment rights without reference to any compelling basis for doing so. Even if this patronage practice could withstand a substantive attack under the First Amendment, there still must be compelling reasons to sanction the distinction which will result if this Court allows the opinion of the Eighth Circuit to stand.

III.

A Variation Of The Fee System Is Present In A Minimum Of 40 States, Thus Providing A Sound Basis For Formulation Of Generalized Legal Precedent Affecting More Than The Litigants Now Before This Court

Much time is spent in the Respondents' Brief directing this Court's attention to the unique and novel status of the fee agent system of Missouri, proceeding on the theory that this unique status does not yield itself to development of generalized legal precedent. This position is erroneous and seriously misleading. Research reveals that the vast majority of the states have, at a minimum, one position akin to the Missouri motor vehicle license agent; petitioners have catalogued a list of statutes which evidence the existence of a fee agent system in each such state (see Appendix A1-A10):

A fee system, as represented by the statutes listed in the Appendix is present in a minimum of forty states, representing 84% of the total population of the United States. Thus, the potential adverse effect of the decision of the Eighth Circuit Court of Appeals is far-reaching and affects more than the litigants now before this Court.

CONCLUSION

For the additional reasons set forth in Petitioners' Reply to the Brief of Respondents in Opposition to the Petition for Certiorari, a writ of certiorari should issue to review the judgment of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

ALABAMA:

(a) ALA. CODE §§ 22-9-5, -9 (1975) (deputy registrar of vital statistics appointed by state board of health compensated on fee basis per vital statistic certificate issued unless registrar also a county employee);

(b) *Id.* §§ 9-11-36, -37 (1975) (license commissioners and agents appointed by commissioner of conservation and natural resources compensated on fee basis per hunting and fishing license issued unless issuing officer is paid on a salary basis);

(c) *Id.* § 40-4-6 (1975) (deputy tax assessor appointed by elected assessor entitled to no compensation out of state or county revenue);

(d) *Id.* § 40-5-2 (1975) (deputy tax collector appointed by elected collector entitled to no compensation out of state or county revenue).

ALASKA

(a) ALASKA STAT. §§ 16.05.390, .470 (1980) (license agents appointed by the commissioner of revenue compensated on fee basis per fishing and hunting license issued unless agent a salaried employee of state);

(b) ALASKA STAT. §§ 18.60.030, .080 (1980) (local registrars appointed by state registrar of vital statistics compensated on fee basis).

ARIZONA

(a) ARIZ. REV. STAT. ANN. §§ 36-304, -307, -309 (1974) (local registrars appointed by director of health services compensated on fee basis);

(b) *Id.* §§ 41-311, -314 (1974) (notaries appointed by secretary of state compensated on fee basis);

(c) *Id.* §§ 17-201, -334, -338 (Supp. 1982) (agents appointed by the Game & Fish Commission to sell hunting and fishing licenses compensated on fee basis).

ARKANSAS

ARK. STAT. ANN. §§ 82-509, -510, -511 (1976) (local registrar of vital statistics compensated on fee basis unless a full time employee of state or local government).

CALIFORNIA

(a) CAL. FISH & GAME § 1055 (West Supp. 1982) (agents authorized by department of fish and game to sell sportsman licenses compensated on fee basis);

(b) *Id.* GOV'T §§ 8200, 8211.5, .8 (West 1980) (notaries appointed by Secretary of State compensated on fee basis).

COLORADO

(a) COLO. REV. STAT. § 33-4-112 (Supp. 1981) (license agents appointed by director of the division of wildlife compensated on fee basis per issuance of hunting and fishing licenses);

(b) *Id.* § 42-1-210 (Supp. 1981) (motor vehicle registration and license clerks appointed by county clerks and recorders compensated on fee basis per transaction);

(c) *Id.* §§ 25-2-103, -109 (1973) (local and deputy registrars of vital statistics appointed by state registrar compensated on fee basis per transaction).

CONNECTICUT

(a) CONN. GEN. STAT. ANN. § 26-30 (West Supp. 1982) (deputy agents appointed by town clerk to issue hunting and fishing licenses compensated on fee basis).

DELAWARE

(a) DEL. CODE ANN. tit. 16, §§ 3108-09 (1974) (local and deputy registrars appointed by the State Board of Health with the approval of the State Registrar compensated on fee basis and serve at the pleasure of the state board of health);

(b) *Id.* tit. 17, § 511 (1974) (proprietors of sporting goods stores and other authorized agents compensated per transaction for each hunting and fishing license sold).

FLORIDA

(a) FLA. STAT. ANN. §§ 117.01, .04 (West 1982) (notaries appointed by governor and compensated on fee basis).

GEORGIA

(a) GA. CODE ANN. § 45-301 (1981 Supp.) (appointed agents of Department of Natural Resources compensated on fee basis per hunting and fishing license sold);

(b) *Id.* § 88-1705.07 (1979) (vital statistics registrars and local custodians appointed by Commissioner of Human Resources compensated on fee basis unless also county employees).

HAWAII

(a) HAWAII REV. STAT. §§ 456-1, -17 (1976 & Supp. 1981) (notaries appointed by attorney general compensated on fee basis);

(b) *Id.* § 572-5 (Supp. 1981) (agents serving at pleasure of department of health compensated on fee basis per issuance of marriage license; salaried employees under civil service code also authorized to issue such licenses but must relinquish all fees in favor of state);

(c) *Id.* § 191-7 (1976) (agents authorized to sell hunting license compensated on fee basis);

(d) *Id.* §§ 607-4, -8 (Supp. 1981) (non-salaried subordinates of sheriff and chief of police compensated on fee basis).

IDAHO

IDAHO CODE §§ 39-247, -252 (1977) (local registrars of vital statistics appointed by state registrar compensated on fee basis).

ILLINOIS

(a) ILL. ANN. STAT. ch. 61, § 3.37 (Smith-Hurd Supp. 1981-82) (authorized agents appointed by Department of Conservation compensated on fee basis per issuance of hunting and trapping license);

(b) *Id.* ch. 111½, §§ 73-8, -9 (Smith-Hurd 1977) (subregistrars of vital statistics compensated on fee basis per issuance of vital statistic certificates).

INDIANA

IND. CODE ANN. §§ 9-1-4-2, -43 (Burns 1973) (branch offices established by commissioner of Bureau of Motor Vehicles compensated per registration or transaction).

IOWA

(a) IOWA CODE ANN. §§ 144.7, .10 (West 1972) (local and deputy registrars of vital statistics appointed by county registrar compensated on fee basis per transaction if not a salaried employee);

(b) *Id.* § 110.11 (West Supp. 1982-83) (agents appointed by county recorder and director of department of conservation compensated on fee basis per issuance of sportsman's license).

KANSAS

KAN. STAT. ANN. §§ 65-2431, -2405, -2406 (1980) (local registrars appointed by state registrar compensated on fee basis per issuance of vital statistic certificate).

KENTUCKY

(a) KY. REV. STAT. ANN. §§ 160.190(3), .230 (Bobbs-Merrill 1980) (agents appointed by Department of Conservation compensated per fishing license issued);

(b) *Id.* §§ 213.030(2)(3), .150 (Bobbs-Merrill 1977) (local and deputy registrars of vital statistics appointed by Department of Human Resources compensated per issuance of certificate of vital statistic).

LOUISIANA

LA. REV. STAT. ANN. §§ 37, 40 (West Supp. 1982) (local registrars of vital statistics appointed by Department of Health and Human Resources compensated per transaction).

MAINE

(a) ME. REV. STAT. ANN. tit. 12, §§ 7072, 7101-02, 7151 (1981) (agents appointed by Commissioner of Conservation compensated on fee system per hunting and fishing license issued);

(b) *Id.* tit. 22, § 2844 (1980) (subregistrars appointed at pleasure of town clerk to issue burial permits and permits for transportation of dead bodies);

(c) *Id.* tit. 29 §§ 52, 52-A (1978 and Supp. 1981-82) (agents appointed by secretary of state to register motor vehicles compensated on fee basis).

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 131, §§ 17-18 (West Supp. 1982-83) (agents authorized by Director of Agriculture and Conservation compensated on fee basis per hunting and fishing license issued).

MINNESOTA

MINN. STAT. ANN. § 98.50 (West Supp. 1982) (subagents of Fish and Game Commission appointed by county auditor compensated on fee basis per hunting license issued).

MISSISSIPPI

(a) MISS. CODE ANN. § 49-7-17 (1972) (authorized officers and agents compensated on fee system per issuance of hunting and fishing license);

(b) *Id.* § 41-57-11 (1972) (local registrar of vital statistics compensated on fee system per issuance of vital statistic certificate).

MONTANA

(a) MONT. CODE ANN. §§ 26-204, -222 (1947) (agents appointed by the state fish and game warden compensated on fee basis per sportsman's license issued except if a salaried employee);

(b) *Id.* §§ 69-4410, -4431 (1947) (local and deputy registrars of vital statistics compensated on fee basis per transaction).

NEBRASKA

NEB. REV. STAT. § 37-203 (1978) (agents appointed by Games and Parks Commission compensated on fee basis per hunting permit issued).

NEVADA

(a) NEV. REV. STAT. § 440-710 (1979) (appointed deputy registrars of vital statistics compensated on fee basis unless compensated by salary);

(b) *Id.* § 482.160 (1979) (Director of Department of Motor Vehicles appoints by contract a person to maintain a branch office for motor vehicle registration and compensated such agent on a fee basis).

NEW HAMPSHIRE

(a) N.H. REV. STAT. ANN. § 261-74(a), (d) (1982) (agents of department of motor vehicles appointed by Director compensated on fee basis per vehicle registration issued if registration agent isn't on salary basis);

(b) *Id.* §§ 208: 15(a), (b) (1977) (registration agent appointed by Director of Fish and Game Commission compensated on fee basis per deer registered).

NEW JERSEY

(a) N.J. STAT. ANN. § 39:3-3 (West 1973) (registration agent of department of motor vehicles compensated on fee system per vehicle registration);

(b) *Id.* §§ 23:3-17, 3-9 (West Supp. 1982-83) (registrar of hunting and fishing licenses compensated on fee basis);

(c) *Id.* §§ 8-11, -12, -17, -18, -56, -59, -60 (West 1964) (local, deputy and subregistrars of vital statistics compensated on fee basis per vital statistics certificate issued unless governing body establishes a fixed compensation).

NEW MEXICO

N.M. STAT. ANN. §§ 66-2-14 to 2-16 (1978) (director of department of motor vehicles shall appoint agents when-

ever necessary to collect all fees and revenues and to issue all licenses or permits and they shall be compensated on a fee basis).

NEW YORK

(a) N.Y. VEH. & TRAF. §§ 206, 305 (Consol. 1976) (authorized registration and inspection agents of department of vehicle and traffic compensated on fee basis);

(b) *Id.* PUB. HEALTH § 4124 (Consol. 1976) (registrars and subregistrars of vital statistics compensated on fee system except if governing body establishes a fixed compensation);

(c) *Id.* ENVTL. CONSERV. § 11-0713(1)(a)(4) (Consol. Supp. 1980) (hunting and fishing license issuing officers compensated on fee basis).

NORTH CAROLINA

(a) N.C. GEN. STAT. §§ 113.151.1, .99, .81.7 (1978) (agents of the Department of Natural Resources and the Wildlife Resources Commission compensated on fee basis per hunting and fishing license issued);

(b) *Id.* §§ 10-1, -8 (1981) (notaries compensated on fee basis).

NORTH DAKOTA

N.D. CENT. CODE § 20.1-03-17 (1978) (county auditor appoints agent to issue game licenses on fee basis).

OHIO

OHIO REV. CODE ANN. § 3705.13 (Page 1980) (local registrars of vital statistics compensated on fee basis).

PENNSYLVANIA

(a) PA. STAT. ANN. tit. 72, § 4866 (Purdon 1968) (recorders of deeds and prothonotaries compensated on fee system);

(b) *Id.* tit. 34, §§ 1311.305, .309, .311 (Purdon Supp. 1982-83) (appointed agents of the Pennsylvania Game Commission compensated per hunting license issued and removable without cause by the Commission).

RHODE ISLAND

R.I. GEN. LAWS §§ 23-3-6 to 23-3-8 (1956) (local registrars of vital statistics appointed by city or town council compensated on fee basis if not compensated from the town or city treasury).

SOUTH CAROLINA

S.C. CODE ANN. §§ 50-9-15, -9-120 to -9-155 (Law. Co-op. Supp. 1981) (agents of South Carolina Wildlife and Marine Resources Department compensated on fee basis per hunting license issued).

SOUTH DAKOTA

S.D. CODIFIED LAWS ANN. §§ 41-6-57, -59, -66.1 (Supp. 1982) (agents appointed by county treasurer to sell hunting and fishing licenses compensated on fee basis).

TENNESSEE

(a) TENN. CODE ANN. § 51-228 (Supp. 1982) (agents appointed by Executive Director of the Wildlife Resources Agency compensated on fee basis per hunting and fishing license issued);

(b) *Id.* §§ 53-406 to -409, -446, -447 (1977) (local and deputy registrars appointed by commissioner of public health compensated on fee basis per vital statistic certificate issued).

TEXAS

TEX. STAT. ANN. art. 42.011-.012 (Vernon 1976) (agents appointed by Parks and Wildlife Department authorized to issue hunting and fishing licenses on fee basis).

WEST VIRGINIA

(a) W.VA. CODE § 16-5-9 (1979) (local and deputy registrars of vital statistics compensated on fee basis if not a government employee);

(b) *Id.* §§ 29-4-14, -4-16 (1979) (agents appointed by department of natural resources compensated on fee basis per issuance of hunting license except if such agent is a state official).